Supreme Court, U.S.
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No. 97-312

In The

Supreme Court of the United States

October Term, 1996

DAVID CUNNINGHAM,

Petitioner,

vs.

SCHLUMBERGER WELL SERVICES, A DIVISION OF SCHLUMBERGER TECHNOLOGY CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the lower courts properly held that a Jones Act claim asserted by an individual who could not possibly meet the criteria for seaman status was fraudulently joined for the purpose of defeating removal jurisdiction.

2. Whether, as implied by the petitioner, this Court erroneously ruled in *Chandris, Inc. v. Latsis*, 515 U.S. 347, 115 S. Ct. 2172 (1995), and *Harbor Tug and Barge Co. v. Papai*, __ U.S. __, 117 S. Ct. 1535 (1997), that a seaman must have a substantial connection to a vessel or identifiable group of vessels and that an "identifiable group of vessels" is one under common ownership or control.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

The parent corporation of respondent, Schlumberger Well Services, a Division of Schlumberger Technology Corporation, is Schlumberger Limited.

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STATEMENT OF THE CASE

A. Procedural History

David Cunningham filed suit against Schlumberger Well Services, A Division of Schlumberger Technology Corp. ("Schlumberger") and others on May 29, 1996 in the 38th Judicial District Court for the Parish of Cameron, State of Louisiana. Cunningham, a Schlumberger employee, asserted a claim against Schlumberger and fellow Schlumberger employees Tony Vovers and Charles Adam pursuant to the Jones Act, 46 U.S.C. § 688, *et seq.* On July 2, 1996, Schlumberger and the other defendants timely removed the case to the United States District Court for the Western District of Louisiana, Lake Charles Division. Removal was premised on the existence of diversity jurisdiction and federal question jurisdiction under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1349. The defendants asserted that the non-diverse individual defendants were fraudulently joined for the purpose of destroying diversity and that plaintiff's Jones Act claim was fraudulently joined for the purpose of preventing removal.

On July 29, 1996, Cunningham filed a motion to remand the case to state court. Conceding that the individual defendants had been fraudulently joined, Cunningham argued only that there was a possibility that he could meet the criteria for seaman status under the Jones Act and that removal was therefore improper. Schlumberger opposed the motion to remand. In a memorandum ruling dated September 26, 1996, the district court, applying the clear precedent set by this Court, concluded that Cunningham's Jones Act claim and the claims against the individual defendants had been fraudulently joined. Accordingly, the district court denied Cunningham's motion to remand.

On October 4, 1996, Schlumberger, along with defendants Tony Vovers and Charles Adam, filed a motion for summary judgment and entry of Rule 54(b) final judgment. The motion for summary judgment sought the dismissal of Cunningham's Jones Act claims against Schlumberger, Vovers, and Adam. Citing its earlier ruling wherein Cunningham was determined not to be a seaman, the district court granted the motion for summary judgment and dismissed Cunningham's Jones Act claims on October 10, 1996. On the same day, the district court issued a judgment certifying its ruling on motion for summary judgment as final under Federal Rule of Civil Procedure 54(b).

Cunningham appealed the rulings on both the motion to remand and motion for summary judgment in favor of Schlumberger to the United States Court of Appeals for the Fifth Circuit on November 6, 1996. Once again, Schlumberger opposed the appeal. On May 27, 1997, the Fifth Circuit issued a *per curiam* opinion affirming the district court's rulings.

B. Statement of Uncontradicted Facts

At the time of the accident made the subject of this lawsuit, plaintiff, David Cunningham, was employed by Schlumberger as a Field Technician. Schlumberger is an oilfield company engaged in a wide variety of activities related to the exploration and production of oil and gas, including wireline, testing and completion services. Schlumberger is typically hired by an oil company to perform well-related services on a drilling rig or well site. Schlumberger employees are not assigned to a particular customer or drilling rig, but instead rotate from job to job and rig to rig as the need arises.

Cunningham began his employment with Schlumberger in May 1989. His work schedule was typical of other Schlumberger employees performing oilfield work. He worked on various types

of drilling rigs, including land, platform, barge, jack-up, and semi-submersible. He was never assigned to work exclusively on any one rig nor any group or fleet of rigs under common ownership or control. His work assignments were on a random basis, depending on the type of work requested by Schlumberger's customer, and the availability of other Schlumberger personnel.

At the time of his accident, Cunningham was performing production testing services on the drilling rig OCEAN AMBASSADOR for Schlumberger's customer, Hardy Oil & Gas. The OCEAN AMBASSADOR, a drilling vessel, was owned by Diamond Offshore and chartered to Hardy Oil & Gas. Cunningham arrived on the rig on Monday, January 15, 1996. While working on Saturday, January 21, a pressurized pipe parted and injured Cunningham's leg. Had the accident not occurred, Cunningham would have likely completed the job and left the rig on or about January 24 or 25. This was Cunningham's first job for Hardy Oil & Gas, and his first time ever on board the OCEAN AMBASSADOR.

REASONS FOR DENYING THE WRIT

I.

THE LOWER COURTS APPLIED THE PROPER STANDARD FOR FRAUDULENT JOINDER.

Cunningham begins his attack on the lower courts' rulings by suggesting that the doctrine of fraudulent joinder may be used to disregard a claim for purposes of removal jurisdiction only upon a showing of the plaintiff's actual fraud or bad faith. Cunningham contends that it was error for the lower courts to conclude that his Jones Act claim was fraudulently joined solely on the basis that he could not possibly meet the criteria for

seaman status. This assertion is contrary to the law established by this Court and to the circuit courts' uniform application of the fraudulent joinder doctrine, and it does not warrant consideration here.

As an initial matter, it should be noted that Cunningham failed to raise this issue before the district court or the court of appeals. Instead, Cunningham confined his lower court argument to the contention that he could possibly meet the criteria for seaman status. It is a matter of well settled law, however, that an issue may not be raised for the first time on appeal. *United States v. Ortiz*, 422 U.S. 891, 898, 95 S. Ct. 2585, 2589 (1975) ("We therefore decline to consider this issue, which was raised for the first time in the petition for certiorari."). Consequently, Cunningham has waived his right to raise this issue.

Regardless of whether the issue has been waived, Cunningham's contention is without merit. Contrary to Cunningham's assertion, the circuit courts did not have to expand on this Court's pronouncement in *Great Northern Ry. v. Alexander*, 246 U.S. 276, 38 S. Ct. 237 (1918), to reach the logical conclusion that a claim with no possibility of success has been fraudulently joined. Instead, the circuit courts reached this conclusion by following well-settled Supreme Court authority. In *Chicago, R. I. & P. R. Co. v. Schwyhart*, 227 U.S. 184, 33 S. Ct. 250, 251 (1913), for example, this Court explained that in deciding whether a claim has been fraudulently joined for purposes of defeating removal, "we have not to consider more than whether there was a real intention to get a . . . judgment, and whether there was a colorable ground for it. . . ." Similarly, in *Chicago, R. I. & P. R. Co. v. Whiteaker*, 239 U.S. 421, 36 S. Ct. 152, 153 (1915), this Court held that a claim has been fraudulently joined if it was made "without any reasonable basis." *See also Chesapeake & O. R. Co. v. Cockrell*, 232 U.S. 146, 34 S. Ct. 278, 280 (1914).

Applying these standards, the circuit courts have consistently concluded that evidence of actual fraud or bad faith is not necessary to establish fraudulent joinder. While Cunningham acknowledged opinions of the Fifth and Eighth Circuits following this rule, he failed to note similar opinions emanating from the Third Circuit, *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108 (3d Cir. 1990), *cert. denied*, 498 U.S. 1085 (1991), Fourth Circuit, *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232-33 (4th Cir. 1993), Sixth Circuit, *Alexander v. Electronic Data Sys., Corp.*, 13 F.3d 940, 949 (6th Cir. 1994), Seventh Circuit, *Poulos v. Naas Foods Inc.*, 959 F.2d 69, 73 (7th Cir. 1992), and Eleventh Circuit, *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996). Significantly, Cunningham was unable to cite a single circuit court opinion which supports his contention that actual fraud or bad faith must be shown for a finding of fraudulent joinder.

Finally, application of Cunningham's theory of fraudulent joinder would lead to an absurd and untenable result. Under Cunningham's theory, a plaintiff with an incompetent attorney unaware of the prevailing law could defeat removal by pleading a baseless claim, while the same plaintiff, with the same baseless claim, but with a more enlightened lawyer, would be unable to defeat removal due to his attorney's bad faith in filing the claim. Removal should not, and indeed does not, depend on the relative knowledge of a plaintiff's attorney. Instead, removal, in the context of fraudulent joinder, depends on whether the plaintiff can possibly establish the cause of action.

In light of this Court's edicts, the consensus among the circuit courts, and the absurd result which would flow from a contrary holding, there is simply no reason to consider Cunningham's theory on fraudulent joinder.

II.

CUNNINGHAM CANNOT POSSIBLY SATISFY THE CRITERIA FOR SEAMAN STATUS.

On the basis of uncontradicted facts concerning Cunningham's work history, the lower courts concluded that Cunningham could not possibly satisfy the required Jones Act criteria in that he did not have a connection to a vessel or identifiable group of vessels that was substantial in terms of duration and nature. Considering this Court's latest seaman status pronouncements in *Chandris, Inc. v. Latsis*, 515 U.S. 347, 115 S. Ct. 2172 (1995), and *Harbor Tug and Barge Co. v. Papai*, __ U.S. __, 117 S. Ct. 1535 (1997), the lower courts here were entirely correct, and there is no just reason to disturb or review the decisions below.

Cunningham argues that he can possibly satisfy the criteria for seaman status despite the absence of a substantial connection to a vessel or identifiable group of vessels. This argument is, at best, disingenuous, for this Court recently reaffirmed that a seaman must have a connection to a vessel or identifiable group of vessels, *Chandris*, 515 U.S. at 368, 115 S. Ct. at 2179, and that an identifiable group of vessels is one under common ownership or control, *Papai*, __ U.S. at __, 117 S. Ct. at 1541-42. That Cunningham spent the majority of his time working aboard vessels is of no consequence, as Cunningham does not contend that those vessels were under common ownership or control. Interestingly, Cunningham chose not to cite the *Papai* decision in his Petition for Writ of Certiorari ("Petition"), despite having relied extensively on the Ninth Circuit's reversed opinion in his briefs to the lower courts. Regardless, this Court's decisions in *Chandris* and *Papai* are dispositive, and Cunningham has suggested no justifiable basis for this Court to revisit the issue.

CONCLUSION

Cunningham has provided this Court with no basis for granting certiorari. Cunningham's Petition fails to present either a mistake of fact or a legal issue not previously addressed by this Court. The relief sought would require this Court to abandon its own recent precedent and rewrite the law to suit the petitioner's purpose. Accordingly, Cunningham's Petition should be denied.

Respectfully submitted,

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